

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHANA HACKETT, on behalf of herself and
all others similarly situated,

CASE NO. 06cv2272 WQH (WMc)

ORDER

Plaintiff,

vs.

THE PROCTER & GAMBLE COMPANY,

Defendant.

Hayes, Judge:

The matter before the Court is the Second Amended Motion to Exclude proposed expert testimony of Mort Westman filed by Defendant The Proctor and Gamble Company (#35).

On March 4, 2008, Plaintiff Shana Hackett, on behalf of herself and all others similarly situated, filed a Second Amended Complaint for Equitable Relief and Damages against Defendant The Proctor and Gamble Company alleging the following claims: violations of California's Unfair Competition Law ("UCL"), section 17200 et seq. of California's Business and Professions Code; violations of California's False Advertising Law ("FAL"), section 17500 et seq. of California's Business and Professions Code; negligent misrepresentation; intentional misrepresentation; fraud by omission; breach of express warranty; breach of implied warranty of merchantability; breach of implied warranty of fitness for purpose; and violations of California's Consumer Legal Remedies Act ("CLRA"), section 1750 et seq. of California's Civil Code. (Doc. # 26).

Plaintiff alleges that she purchased a product known as Pantene Pro-V Daily Moisture

1 Renewal from the Defendant which is falsely promoted as able to strengthen and repair
 2 damaged hair. Plaintiff alleges that she purchased the product because she was exposed to
 3 representations by Defendant that the product would strengthen her hair; that she was seeking
 4 a safe method for strengthening her hair; that she relied upon these material representations as
 5 a basis for her choice; and that after using the product for some time she realized that it had
 6 no strengthening effect and that Defendant's claims were false.

7 Specifically, Plaintiff alleges "the packaging of the Product makes a false and
 8 misleading claim regarding the effect of using the Product on hair, stating: '10X Stronger
 9 Hair.'" *Id.* at 2. Plaintiff alleges that "the term 'stronger' when applied to hair has a clear and
 10 unambiguous meaning that is well known and easily understood to consumers: as tensile
 11 strength, i.e., resistance to stretching." *Id.* Plaintiff alleges that the tests that Defendant relies
 12 upon to support its strength claim do not measure strength and instead "only demonstrate, if
 13 anything, that merely smoothing the surface of hair through lubrication may reduce friction
 14 from combing or brushing." *Id.* Plaintiff alleges that "Defendant's testing does not evaluate
 15 or demonstrate that tensile strength of the hair is increased by use of the Product." *Id.*

16 On April 10, 2008, Plaintiff provided Defendant with the expert report of Mort
 17 Westman pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure.

18 CONTENTIONS OF THE PARTIES

19 Defendant moves the Court to exclude "Mr. Westman's opinion regarding consumer
 20 perception." (Doc. # 37 at page 5). Defendant contends that Westman's opinion regarding
 21 consumer perception should be excluded on the grounds that 1) Westman does not have the
 22 education, training or experience to give expert testimony as to consumer perception of
 23 advertising or product promotion claims, 2) Westman's consumer perception opinions are
 24 unsupported by any methodology, and 3) Westman's consumer perception opinions will not
 25 assist the trier of fact and usurps the role of the jury.

26 Plaintiff responds that Westman was retained to provide expert testimony regarding
 27 Defendant's testing methods used to support Defendant's claim that the product causes hair
 28 to become stronger. Plaintiff states that Westman's testimony at trial will be restricted to the

1 validity of Defendant's testing methods as a basis for Defendant's claim of stronger hair and
 2 that Westman's comments in his report and deposition testimony regarding consumer
 3 perceptions are peripheral to his findings.

4 In reply, Defendant asserts that Westman's entire testimony should be excluded on the
 5 grounds that tensile testing is required to support Plaintiff's claims only if consumers interpret
 6 Plaintiff's claims to stronger hair to refer to tensile strength. Without Westman's testimony
 7 that consumers interpret Defendant's claim to stronger hair as referring to tensile strength,
 8 Defendant contends that Westman's testimony regarding his testing methods do not fit the
 9 facts of this case and should be precluded.

10 APPLICABLE LAW

11 Rule 702 provides as follows:

12 If scientific, technical, or other specialized knowledge will assist the trier of fact
 13 to understand the evidence or to determine a fact in issue, a witness qualified as
 14 an expert by knowledge, skill, experience, training, or education, may testify
 15 thereto in the form of an opinion or otherwise, if (1) the testimony is based upon
 sufficient facts or data, (2) the testimony is the product of reliable principles and
 methods, and (3) the witness has applied the principles and methods reliably to
 the facts of the case.

16 Fed. R. Evid. 702. The trial judge must find that expert testimony is "properly grounded, well-
 17 reasoned and not speculative before it can be admitted." Fed. R. Evid. 702, Advisory
 18 Committee Notes (2000). The proponent of expert testimony has the burden of proving the
 19 factual prerequisites necessary to the admissibility of expert testimony by a preponderance of
 20 the evidence. *See Daubert v. Merrell Dow Pharmas, Inc.*, 509 U.S. 579, 592 (1993); Fed. R.
 21 Evid. 702 Committee Note (2000). Upon objection, a district court must make a preliminary
 22 fact determination "concerning the qualification of a person to be a witness, [and] . . . the
 23 admissibility of the evidence." FEDERAL CIVIL TRIALS & EVIDENCE § 8:1627 (quoting Fed.
 24 R. Evid. 104(a)).

25 CONCLUSION

26 Westman has an educational background in chemistry and professional experience in
 27 research and development of hair dyes. Westman was retained by Plaintiff to provide expert
 28 testimony regarding Defendant's testing methods used to support Defendant's claims that the

1 product causes hair to become stronger. Westman has offered opinion testimony involving
2 issues of consumer perceptions and market research in his report and his deposition. The Court
3 concludes that Westman is not qualified to offer any expert opinions involving issues of
4 consumer perceptions and market research.

5 Defendant's additional objection stated in its reply to the testing methods portion of
6 Westman's report and proposed testimony is a relevance objection. While the Court is able
7 to determine at this time that Westman is not qualified to offer expert testimony regarding
8 consumer perception and market research, it is too early in the case to preclude all testimony
9 regarding his testing methods testimony on relevance grounds.

10 IT IS HEREBY ORDERED that the Defendant's Second Amended Motion to exclude
11 proposed expert testimony of Mort Westman regarding consumer perception and market
12 research (#35) is granted. IT IS FURTHER ORDERED that Plaintiff shall provide an
13 amended expert report under Rule 26 (a)(2)(B) which reflects this Court's ruling that Westman
14 is not qualified to offer any opinions regarding consumer perception and market research and
15 is a "complete statement of all opinions the witness will express."

16 DATED: October 17, 2008

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18 **WILLIAM Q. HAYES**
United States District Judge

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